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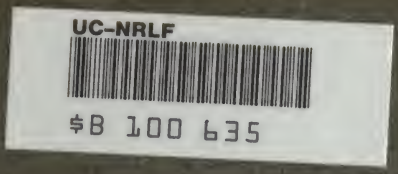

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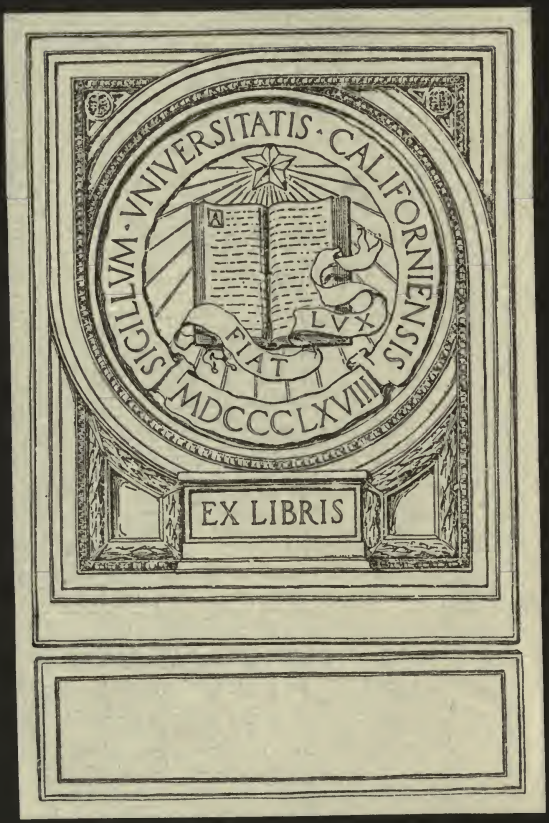
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(*Second Edition.*)

WRIGHT ON BUILDING ARBITRATIONS

A MANUAL FOR ARCHITECTS, STUDENTS, CONTRACTORS AND CONSTRUCTION ENGINEERS

UNIV. OF CALIFORNIA

BY

G. ALEXANDER WRIGHT

(Member San Francisco Chapter American Institute of Architects; Member Technical Society of the Pacific Coast; author of "Wright on Quantities").

(*By Mail, One Dollar*)

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Preface to Second Edition

The first edition of this little Manual appeared in May, 1894, and consisted principally of an Address upon the subject of Building Arbitration given by me before the Technical Society of the Pacific Coast. Having good reason for believing that my layman-like efforts had proved of service to some who for the first time found themselves occupying the position of Building Arbitrator, I was prompted some years later to revise my earlier work and to add some other information and data, including several Forms for the Arbitrator's use. My spare time being limited, this was not finally accomplished until early in 1906, and, unfortunately, my manuscript was then destroyed by the conflagration of April 18th to 21st, in that year, since which time I have had only an occasional opportunity of again proceeding with my task.

"Building Arbitrations" is not a law book in any sense of the word, nor is it intended to be used as such. The principles of Arbitration are, however, not difficult for the layman to understand, and my aim has been to compile and codify the facts in a common-sense and convenient form, with such information as will enable the Architect, the Contractor and the Engineer to act intelligently, and in order, when it becomes necessary, to occupy the honored position of Arbitrator or Umpire without, I hope, transgressing those statutory requirements essential to a properly conducted Arbitration.

THE AUTHOR.

San Francisco, June, 1913.

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MANUAL

ON

BUILDING ARBITRATIONS

For the use of Architects, Students, Contractors, and Construction Engineers, or others who may be called upon to act as Arbitrator or Umpire in the settlement of disputes connected with Building or Engineering Construction operations.

With the following convenient Forms, viz:

Form A—Demanding Arbitration.

" B—Accepting Arbitration.

" C—Submission.

" D—Acceptance by Arbitrators.

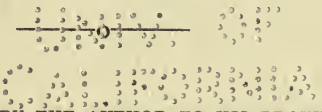
" E—Acceptance by Umpire.

" F—Notice of Hearing.

" G—Subpoena for Witnesses.

" H—Oath and Affirmation.

" I—Award.



RESPECTFULLY DEDICATED BY THE AUTHOR TO HIS BROTHER ARCHITECTS, AND CO-WORKERS THE CONTRACTORS AND ENGINEERS.

(*Volenti non fit injuria*)

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UNIV. OF CALIFORNIA

WRIGHT ON BUILDING ARBITRATION.

CHAPTER ONE

Introduction

It is scarcely possible, when considering the basic principles of Arbitration, to present to the reader anything that can be justly termed new or original. The following pages consist principally of notes made from time to time by the Author for his own guidance, with perhaps some practical suggestions; also blank forms such as he has found useful in conducting Building Arbitrations. The present might well be termed the Arbitration Age, and it is the opinion of competent judges that the arbitration of building disputes will, in the near future, be more frequent and more closely allied than ever before with the work of the architect, the contractor and the engineer.

Early Origin: The word "arbitration" comes to us from the Latin "arbitratus" (to be a hearer) and "ar" and "betere" (to go hence, one who goes to look on). This method of determining differences between men and peoples has been practised from earliest times, and distinct reference to its principles are found in the Scriptures. The Amphictyonic Council, organized 600 B. C. for the protection of the temple of Delphi and the abolition of war, also proposed the accomplishment of its object by arbitration, very much as we know it today. So well recognized were these principles in Greece that when Sparta and Argos made a treaty of alliance they provided for the settlement of their disputes by arbitration, according (as we are told) to a custom of their ancestors. Again, the practice of Arbitration comes to us from Justinian jurisprudence, and its influence may be traced throughout most civilized nations. Rome, in the pride of her glory and power, acknowledged the

good side of arbitration when Pompey directed the Parthians and Armenians to regulate their differences by this means.

It is most interesting to observe also that the arbitration proceedings of today differ but very little from those of the ancient Greeks, for in their day it was usual to make agreements designating the Arbitrator and also the matters in dispute. It was the arbitrator who fixed the time and place of the investigation, and he was solemnly pledged to discharge his trust honestly. The "sentence" was also written out and deposited in temples and other public places, and oaths were taken by the parties that they would execute the sentence imposed.

During the middle ages arbitrations seem to have been more frequent, yet their beneficial influence was restrained, owing to the absence among the people of the idea of conciliation. Blackstone describes it "as a method whereby the parties, injuring and injured, submit all matters in dispute concerning any personal chattels or personal wrongs, to the judgment of two or more arbitrators, who are to decide the controversy, and if they do not agree, it is usual to add that another person be called in as 'umpire,' to whose sole judgment it is then referred, or frequently there is only one Arbitrator originally appointed." We find in the latter case some authorities prefer to use the word "arbiter," which was also used in this sense under the Roman law.

Happily in modern times arbitration is still more universally appreciated as a means of settling differences of every kind, from those of international importance to the adjustment of the manifold questions which continually affect Capital and Labor. So general, indeed, is this principle that in certain States even breaches of contract, trespass, assaults, charges of slander, differences between partners and even breach of promise may be settled by arbitration; and so the principle has come down to us in an almost unbroken line from ancient times.

Referring for a moment to international arbitration, it is not so long since the Emperor of Russia advocated a national conference with the object of substituting its principles among nations as a remedy for war. It should be a matter of pride to American citizens to recall the fact that since her birth as a

nation, the United States has ever been foremost in consenting to the arbitration of questions which other nations might have considered a justification for bloodshed; and we find no fewer than forty-seven such cases in a little over one hundred years, an excellent showing indeed. And in addition to arbitrating her own differences the United States has, herself, acted as arbitrator between other nations upon some fourteen or more different occasions, and even as we go to press the very atmosphere from the Atlantic to the Pacific appears to be charged with appeals for arbitration.

CHAPTER TWO

Building Arbitration: Its Advantages

A BUILDING ARBITRATION in its broadest sense is, we may consider, a kind of friendly tribunal substituted for a regularly recognized court, and permitted by statute which is, very properly, somewhat arbitrary and strict in regard to the proper methods of procedure. The bringing about of arbitration is a voluntary act on the part of disputants, who by its means select their own judges, and it becomes, when properly conducted, a speedy and inexpensive, and should be a friendly way of finally adjusting and determining almost any dispute which may arise in connection with construction work. It must not, however, be supposed by the layman that arbitration can at all times take the place of the law, nor does it by any means dispense with the services of the competent attorney. Indeed, in unusually difficult or complicated controversies, professional legal advice as to the course of procedure is recommended, particularly in the preparation of the Submission, which forms an extremely important document. In such cases, too, the "form" of the award (but not the actual award) should be prepared by or under the advice of counsel.

Arbitration must appeal to honest men, and to men who think right. It is not for the unprincipled, and men whose sole desire is to get the best of each other. It is an honest and

manly way to settle an honest difference between man and man. The Chicago **Daily Tribune** of February 1, 1912, quoted the recent remarks of a prominent jurist at a monthly meeting of the Chicago Bar Association as follows: "The chief reasons why the members were discussing the questions of reform in the practice and procedure of their courts, was the demand throughout the United States that legal procedure be made more effective, more speedy, more just." At the same meeting the president read a letter expressing the views of another distinguished member of the Chicago Bar, as follows: "The great and, in my opinion, chief trouble with our administration of the law is that a trial in court is regarded and treated as a 'battle,' in which the contestants may, without loss of self-respect, use all means not bordering upon the downright criminal, to gain their ends, and if deemed expedient, to obstruct the cause of justice." Another member present recited the simplicity of procedure in Courts of Admiralty. "We proceed," said he, "as if they were courts of justice. The procedure in the State Courts is such an abomination that if the laymen knew as much about the practice as we do, they would rise up and smite it."

Such views from authoritative lips must surely prompt the technical layman to regard arbitration with still greater favor, for the prompt, equitable adjustment of technical differences.

It may be of interest to note in passing that in 1911 the Chamber of Commerce of New York issued a very convincing pamphlet entitled "Commercial Arbitration," showing how disputes may be adjusted without litigation, and the interested reader might well procure and read this publication, which, coming from so important a body, possesses a special value.

What architect, contractor or engineer is there, of any mature experience, who cannot recall at least one technical case which would have been better determined by the arbitration of practical men rather than by a suit? Is it not safe to say it would have been settled more quickly, more economically, and, with all due respect for the law, more satisfactorily, perhaps, to the disputants?

Just now we seem to be living in what might well be described as the "Age of Arbitration," the only method, it would

appear, of adjusting our differences. Regulated by statute as it is, it results in prompt and fairly equitable settlements, and, it may be said, without causing that bitterness of feeling so often apparent in suits at law. It is a practical solution of the difficulty which our respected judges experience in their efforts to hear and determine building disputes fairly. Technical and practical men, however, understand the technique of such disputes, and can follow every point of the testimony, wherever it may lead, and then reason, we may say, takes the place of those technicalities which seem to be so inseparable from court practice.

The author has profound respect for the painstaking judge, the one who endeavors to grasp the thousand and one technical points which arise in construction suits, and no disrespect whatever is intended nor inferred; but it does happen sometimes that neither the court nor the disputants' attorneys have a sufficiently accurate perception of the true construction or the meaning of the drawings, sections, details, specifications, etc., to say nothing of the usual methods of working on a structure, trade customs, and other matters which most of us become familiar with by actual daily contact, nor, indeed, can it be expected they should be. It must, however, be very difficult to give fair decisions without such knowledge, and so it happens sometimes, notwithstanding the great skill and care displayed by the court and counsel, that much of the technique in evidence is but partially understood, and testimony that might be brought out under a technical tribunal is lost. The expert, or rather technical, witness, sometimes meets with and recognizes just such conditions.

A building dispute, such as that, for example, which may arise when an owner declines, for some reason, to pay for work performed, may be arbitrated by the terms of the contract or by subsequent mutual consent. This brings some advantages immediately. There is no waiting; the "trial" commences immediately, and quick settlement follows, the author thinks, with better results than in court practice, for the reason that all the facts are still fresh in the minds of the parties and their witnesses. This very point was once well illustrated in the author's

own practice. During the preparation of the first edition of this manual he was subpoenaed to give testimony in a suit regarding the quantity of certain work performed in a building. The claim originally was for $400 odd. The case had been on the calendar nearly three years, and the testimony on final hearing was much in conflict, owing, I believe, to conscientious inability on the part of the witnesses to remember just what the facts were. Arbitration three years before would have saved money, much time and some vexation.

Again, in court a jury is apt to attach undue importance to a large number of witnesses, but a few good men of known honesty and ability are more convincing to the technical arbitrator, who himself possesses that practical experience and judgment essential to an equitable decision. He also knows what portion and how much of such evidence may be properly accepted or rejected. This is one argument in favor of arbitrating technical disputes, and even a stronger argument why the architect, the contractor and the engineer should understand the fundamental principles of Arbitration, and their application in the settlement of disputes concerning their particular spheres of work. Arbitration is perhaps one of the most practical of subjects in the statutes, easily understood and readily applied, a further knowledge of which might well form part of our professional and business training, enabling us to occupy with more usefulness to our fellow man and credit to ourselves, the honored position of technical arbitrator when the necessities of our work or duty demand it.

A court trial differs, of course, from one held before technical judges. In the former, witnesses are always entitled to be considered as truthful until proved otherwise. The Court knows nothing personally of the weight which might be attached to their technical testimony beyond that which appears on the face of what has been put into words, whereas technical men, or even mechanics, as witnesses, when testifying before a technical tribunal would in all probability be personally known by one or more of the arbitrators, and the witnesses' reputation for honesty, as well as technical knowledge, could be considered and placed at its real value after making such allowances as

may seem proper. In other words, their evidence could be sifted, so to speak, and a proper value attached to that which was pertinent to the issues.

With an arbitration the hour and place of hearing may be fixed with some regard to suit the convenience of the parties and their witnesses; for example, sessions may be fixed for evenings or other times out of the ordinary business hours. Such a concession cannot, of course, be expected from the regular courts. Then, again, there is more opportunity and latitude for producing rebuttal evidence; but in court practice, if the best and strongest testimony be not produced according to the rules of procedure, the opportunity of doing so may be lost. Again, there is less risk of one side being overthrown by surprise testimony, as sometimes occurs in court. Technical arbitrators have a way of getting down to the facts. They go at once to the very essence of the dispute, and are not hampered by precedent, cases or court rules. In short, they quickly get to the truth, the whole truth, and nothing but the truth, without formality or hindrance, and are then able to render judgment according to the testimony coupled with their own technical knowledge in a common-sense, business-like manner, and their decisions are usually accepted in good grace by the disputants.

Occasionally one hears it alleged that arbitrators may be uncertain judges, admitting evidence of a certain nature at one time and rejecting it at another, or that they are liable to inconsistency regarding the weight of evidence presented, or that they may be unduly firm and hard to convince today, and yet tomorrow may be unnecessarily yielding, and so forth. Care should, of course, be exercised to guard against these inconsistencies. Years ago there might have been some grounds for these charges, but the arbitration idea is fortunately now getting such a hold on the people that the tendency to such mistakes has become much modified of late years. Such objections certainly do not hold good where arbitrators are men of experience. It is unreasonable to assert that arbitration is good provided the arbitrators are perfect. Would is not be equally as reasonable to assume that the courts are good only if every judge is perfect? It is doubtful whether His Honor

himself would maintain that this condition has always existed, though it is very far from the author's intention to cast the least reflection upon the honorable and experienced judges in our courts.

There are probably cases, even with arbitration, where the parties to a submission are no more satisfied with the award than they would have been with a court decision after trial lasting a year or two. Such dissatisfaction arises very often from an incorrect estimate of the real purposes of arbitration, but this neither proves nor disproves anything. Some parties may occasionally cherish a grievance unless they are awarded the whole or nearly all of whatever they choose to claim, but this in no way affects injuriously the great advantage which arbitration possesses over law suits in adjusting technical disputes. Fair-minded contractors and owners (and neither are as scarce as some people think) are not only usually satisfied with an award of their fellows, but are more than glad to get their differences so easily adjusted and so quickly off their minds without resorting to an action at law, and going through those experiences which such a step implies. We have but to refer to the calendar to realize how frequently these technical cases find their way into the courts, whereas they could be more readily and more satisfactorily disposed of either in the ordinary method of arbitration, or by assigning such cases, we will say, to a technical referee, or by arranging for their hearing by a Court of Arbitration.

In the court trial of technical suits connected with construction work, the best technical witnesses obtainable are in frequent demand, and the reason is not far to seek. Indeed, the author believes that the time cannot be so far distant when the courts will realize the advantage of referring building and similar technical cases to competent technical judges. This course prevails in some of our large cities, with much advantage. It also relieves the overcrowded calendars, and in this way greatly facilitates the work of the courts, and the people get the benefit.

The establishment of a permanent Court of Arbitration, or technical tribunal, for the hearing of building and engineering

disputes alone, would, the author believes, possess some distinct advantages. Apart from controversies arising from the contract systems, take the differences which will sometimes occur between the professional man and his client; most of us know something of the uncertainty of submitting such differences in court to a jury of laymen. These cases should be invariably adjusted by technical men familiar with custom and equity in such cases.

Or, if this should be considered too sweeping a change in our judiciary methods, then perhaps a particular judge might be set apart, and be given a special court to try, in conjunction with two or more architects, contractors or engineers (who would sit in bank with him), the special classes of cases under consideration.

CHAPTER THREE

Arbitration: Its Place in the Work of the Architect, Contractor and Engineer

In no direction probably has the spread of the principles of arbitration been greater in recent years than in connection with the carrying out of contract building and engineering work. At any time now the architect, contractor and engineer is likely to be called upon to apply these recognized principles, and yet it is the exception rather than the rule to find the subject even mentioned in our literature upon Construction. Legal works exist for the use of and reference by our friends the attorneys, and the digests contain many cases and decisions arising out of arbitrations more or less properly conducted, the most frequent examples of cases consisting of the efforts of one of the parties to cause the setting aside or vacation, of an award; but there seems to be very little available in an easy-for-reference manner adapted to the layman's needs, and this may account, in a measure perhaps, for the want of familiarity with arbitration methods one occasionally observes when attending arbitrations.

No class of men, probably, are more competent on the whole and technically to act as arbitrator or umpire in the adjustment of building and engineering differences than the experienced architect, contractor or engineer, and in view of the increasing popularity of arbitration along these special lines of work there are increasing opportunities for the employment of such technical arbitrator, and undoubtedly the demand for experienced judges in this particular sphere will increase materially as time goes on; and consequently, upon general principles, we can all with perfect consistency urge the adoption of arbitration for the settlement of nearly every case of disagreement which occurs in the carrying out of contracts, upon the grounds of economy, saving of time, equitable adjustments, and general expediency.

The suggestion is occasionally made that an attorney would make a more satisfactory arbitrator than a layman, it being alleged that a legal mind is more competent to judge as to what is proper evidence and the best method of obtaining and presenting it. If technical disputants desire (which they are less inclined to do every year) their differences settled purely from the legal aspect, they would not accept arbitration as readily as they do. The questions which most frequently come up before arbitration tribunals are not questions of law, but of fact, controversies concerning construction, value of builders' work, drawings, details, trade customs or some such matter which the technical arbitrator usually has at his fingers' ends, and he can therefore personally decide what is right and proper to be done under varying conditions and circumstances. The author has serious misgivings whether among his legal acquaintances there is even one who would doubt the value of the technical knowledge of the competent architect, contractor or engineer when it comes to investigating and deciding upon the merits of technical disputes arising in their own particular lines of work.

The principles of arbitration should form part of the curriculum of our universities, colleges and technical schools. Certainly peace is more important than war. It is less expensive and more manly. Indeed arbitration should be more generally

applied in all affairs among business men, when honest differences arise upon questions of fact.

CHAPTER FOUR

Arbitrators: Their Qualifications, Duties, Etc.

A disputant may nominate any person as his arbitrator, for every person possesses the natural right to select whom he pleases for his private judge; but in seeking to avail himself of this right he should use care and discretion, such, for example, as might be displayed in the selection of a juryman. The person so selected must declare his acceptance of the office and agree that he will faithfully, fully, and fairly hear the allegations and evidence, and make a just and true award according to his best understanding.

Building contracts usually provide for the appointment of one arbitrator by the owner and one by the contractor, these two to select a third arbitrator, or umpire. The author, however, seriously questions the advisability of this method in the interests of impartiality and justice, for there is always the danger that one, and perhaps even the second, arbitrator might assume the attitude of an advocate for the party who selected him or them. It would appear that if more than one arbitrator were selected (in such a case jointly by both parties), it would be better for the two parties to agree upon three arbitrators at the outset. Then each would feel that if acting at all for the parties it would be for them all equally, and the tendency sometimes shown towards partisanship would have no cause to exist. Arbitrators must not attempt to be advocates and judges at one and the same time. Where two arbitrators are unable to agree and they appoint a third, or umpire, it becomes practically a one-man arbitration, just the same.

In matters of disputed accounts mercantile men are often selected, in other cases attorneys at law. In building and en-

gineering disputes, such as we have under consideration, the logical arbitrator is the architect, contractor, or engineer, depending upon the exact nature of the dispute.

An arbitrator's chief qualifications are honesty of purpose and action, impartiality, good judgment, clear-headedness, and patience, the ability to listen rather than to talk. He should be absolutely free from any possible bias, open-minded, broad, lenient towards the peculiarities of men. He should, when acting as an arbitrator, be above accepting any favors, however slight, and not even any part of his legitimate compensation prior to the award. The accepting of hospitality or refreshments from one of the parties is prejudicial, and may be sufficient to justify the attempt of a dissatisfied party to upset the award. All such acts are liable to misconstruction, should the matter be ultimately taken into court, or otherwise, even though no evil or corrupt act was intended. In short, it is highly improper for arbitrators, when acting as such, to accept favors from any person directly or indirectly interested, and they cannot be too discreet in speech and conduct if they wish to preserve their award from attack.

If a person, when asked to act as an arbitrator, has any business connections with either party to the dispute, or if in the least unfriendly disposed to the opposite party, it would be better for him to announce the fact or decline to act. Some authorities declare that an arbitrator should not be related to either party; but if this is known to the other side, and no objection is raised, and the nominee is otherwise disinterested and competent, then there would seem to be no valid reason why he should not act; and the same would apply in cases where either of the parties happen to be debtors or creditors of a suggested arbitrator. Building disputants should beware of nominating persons already prejudiced in their favor, or who may have any secret interests with either party, or if their minds are already made up concerning the dispute. Indeed, in such a case the subsequent proceedings would be a farce, not arbitration.

Above all, in cases where the submission is made an order of the court, the arbitrator should remember that he is, for the

time being, an officer of the court. His mind must at all times be open to honest conviction; any disposition to stubbornness or laxity should be carefully avoided and perhaps even more so if he be called upon to act as an umpire. He should have, so to speak, a semi-judicial mind, be systematic, of a practical rather than of an ethereal and vacillating temperament, and be guided, so far as his ability permits, by the same principles which govern a jury in arriving at a verdict. The first duty of an arbitrator is to qualify (see Form D) before an officer of the court authorized to administer oaths, usually a notary public (M. E. Church vs. Seitz, 74 Cal., 287; 15 Pac., 732). The umpire, if called in, must be similarly sworn. (See also Chapter Five, mode of Procedure.)

It is the arbitrator's duty to appoint a time and place of hearing, to notify the parties (see Form F), to adjourn upon motion as often as necessary, give due notice as to continuance of the hearing, the time and place for the next hearing, and so forth. Arbitrators must allow a reasonable time when fixing a date for hearing, in order that both parties may be ready to present their respective claims and testimony.

There is no place in arbitration for any Shylock practices. Arbitrators should not decide until every piece of testimony has been presented and considered, and they must be patient and listen to all that is said. It should be borne in mind that any decisions arrived at after long and patient hearings are the most likely to be just, and therefore acceptable to the parties in interest. Any attempt to pass judgment upon matters outside those named in the submission, or to extend the arbitrator's authority beyond the terms thereof, is without legal force, and if done may injure the award. The duties of an arbitrator must not be delegated to a second person. If, however, the opinion or knowledge of any person—for example, an independent attorney, or an expert—is necessary to "confirm" the arbitrator's own individual opinion or understanding, it is allowable to obtain such assistance, but care must be taken not to follow blindly such a person's advice, opinion, or knowledge. It is in a similar way permissible, when necessary, for an arbitrator to fortify

his own opinion by consulting outside parties regarding, for example, matters of construction, prices, etc., but this also should be done with some caution, for as a matter of principle it may be dangerous to go outside for evidence, and it is usually safer in the end to obtain such information by placing the persons upon the witness stand in the regular way.

Any architect, building contractor or engineer who is otherwise qualified, should never hesitate to act as a Building Arbitrator or Umpire. As an impartial judge between disputants, it is a great compliment to be invited to fill such an honored position. It is a most useful office, and he who fills it with fairness to others is entitled to the gratitude of his fellow men, entirely apart from the modest compensation which may be his.

Arbitrators should never permit parties to a submission to influence them in the nomination of persons to act as umpire. The selection lies with the arbitrators alone, and it makes no difference whether the parties to the Submission are or not satisfied with the umpire selected. And here is an important point that must not be overlooked: the umpire must be **selected.** He must not be chosen by drawing lots, nor by the tossing up of a coin, nor by any other method of chance, which has before now been done, when the names of two or more eligible parties for umpire have been submitted. The appointment of the umpire should be in writing (see Forms D and E) by agreement between the arbitrators.

A case sometimes occurs in which arbitrators, although acting in perfectly good faith, are unable to agree upon a third party, especially if the umpire's appointment has been left until disagreement occurs between the arbitrators. Even the court itself, it seems, would be without powers to compel an arbitrator to accept any particular person as an umpire. The author once had such a case. The conditions were such that it was impossible to agree upon an umpire. The co-arbitrator was inexperienced and stubborn, and the arbitration had to be ultimately abandoned; suit followed, and in due course (nearly two years later) judgment was rendered in favor of my co-arbitrator's side, but for about one-third of the amount which

would probably have been awarded in any fairly conducted arbitration. This, however, forms a good illustration of the effects of stubbornness on the part of an arbitrator, and persons of this particular temperament should not be nominated to serve as arbitrators.

The arbitrator should not personally seek to obtain privately any so-called inside information or evidence from the parties or their witnesses. Should he, however, be voluntarily furnished with any such information or message bearing upon the matters under consideration, it is his duty immediately to inform his co-arbitrators on all such things.

Arbitrators will administer oaths (see Form H) to the witnesses, and above all things they must act together; this is imperative in all things. The majority may determine any question; in other words, two may do any legal act which three have authority to do under the terms of the submission.

They must decide **ALL** the matters in controversy, omitting to consider nothing, and leaving nothing in doubt or undecided. Each arbitrator should carefully study every detail of the case, however small, bearing fully in mind well-known trade customs and precedents if any bear upon the questions, and leave nothing undone that will assist in forming a proper decision. Still, it cannot be too strongly emphasized that arbitrators are not advocates, nor mediators for any one party.

The author has met inexperienced arbitrators whose sole idea of their duty and position seemed to be to "fight for" and to take everything in sight, or out of sight, for the party who nominated them, thus violating their oath, of course, to hear fairly the allegations and to make a just and true award according to their understanding. Such a proceeding becomes a travesty upon the true intention of arbitration. An arbitrator should be selected for his integrity and honesty, and not because of his willingness or desire to help his friend. He is chosen to do what is right—or he should be.

It is not the duty of an arbitrator, after assuming his duties, to suggest compromise to either party, but he must perform his duties in the manner he is sworn to do. It is permissible

for arbitrators, in settling disputes, to make such mutual concessions between themselves as may be just and proper, but they must not decide upon, and do, such acts against their own individual judgment.

The authority of arbitrators terminates immediately upon their giving notice to the parties of their inability to make an award under the term of the submission, or upon the death of one of them if it occurs before an award has been made.

The duties of arbitrators being judicial in their nature, they cannot be held for damages for failure to exercise care or skill in the performance of their functions.

Regarding the powers of arbitrators, they occupy for the time being a position similar to that of the Judges of the Superior Court. They should endeavor, as far as possible or desirable, to arrive at correct conclusions by the same rules as would have governed the court for which they have been temporarily substituted.

CHAPTER FIVE

Submitting Matters in Dispute to Arbitration—the Submission

The first step is for the disputing parties to enter into an agreement whereby they consent to the provisions therein, and not only to arbitrate their differences, but agree to stand to and abide by the award, or, in other words, to obey and perform all orders, decisions and judgments of the arbitrators as covered by the award. This agreement is technically known as the "Submission" (see Form C), and the subsequent award depends largely upon its terms and conditions. It should be a perfectly clear statement and instruction to the arbitrators as to the true intentions of the parties and of the duties he has to perform. It must clearly set forth the exact subject matter of the reference, so that the award may be made perfectly clear and in accordance therewith, so that the arbitrator may not

exceed the proper limits of his authority. The exact form or wording of a submission is in one sense immaterial, provided that it is, according to statute, made perfectly clear that the parties did intend to arbitrate, and that they stated just what was to be arbitrated between them, and that the arbitrator's decision should be the award. The law implies that the parties agree to abide by the award whether this is specifically mentioned or not.

As the submission is an important instrument, however, its preparation requires care, and this is sometimes attended to by the attorneys of the parties, particularly if the controversies are of an unusually complicated nature. For an ordinary arbitration, however, the submission is quite often drawn up by a notary, or by the prospective arbitrators (in the same way as they may later on prepare an award), provided it be done in accordance with the Code, and reference should be made in the submission to the statute under which the arbitration is conducted. But if this document is prepared by an attorney, I have found it no disadvantage for the arbitrators to be acquainted with the fundamental principles involved, and it is these only which we have under consideration. The author's experience has been that attorneys are always willing to consider carefully any suggestions made by those who have had practical experience with arbitrations. The essential point is not so much in the technical knowledge necessary to prepare arbitration documents as it is to so present the facts to the disputing parties and others, so that they shall prefer arbitration in place of resisting technical claims by suits at law. Indeed, it does not seem that one's professional ethics or business methods would be seriously violated if, at every suitable opportunity, architects, contractors, and engineers were to give prominence to the advantages of arbitration over actions-at-law in all matters of technical dispute.

If, proceeding under the provisions of the Code (and the author suggests this is the only satisfactory way to proceed), the submission, which is equivalent to pleadings in court trials, must be in writing if it is to be entered as an order of the Superior Court. This is done by filing the executed document with

the Clerk of the county in which one of the parties resides, and paying the filing fee. A note of the filing of the submission must thereupon be entered by the County Clerk in the Register of Actions, as held in the case of Kettleman vs. Treadway, 65 Cal., 505. The mere authority to file, without the act, is insufficient, but by inspecting the Register of Actions an arbitrator may always satisfy himself that this has been done. The entry should contain the necessary particulars—for example, the names of the arbitrators, and the time limited by the submission, if any, within which the award must be made. After such entry has been made a submission cannot be revoked without the consent of both parties, or by leave or order of the court. But in the case of the California Academy of Sciences vs. Fletcher, 99 Cal., 207, it would appear that the word "thereupon" does not necessarily mean immediately, for in this case such entry was not completely made until nineteen days after the award was made and filed, but it was held that jurisdiction did exist to enter judgment upon the award, which was done. We see, therefore, that the submission may be filed at any time before judgment is entered upon the award.

Valid verbal submissions may be made. They possess disadvantages, however, like other verbal agreements; moreover, they cannot be made an order of the court, and the award, when made, is under a similar disadvantage.

In a general way, any person legally capable of making a contract may submit controversies to arbitration, but it should be remembered that a single partner cannot bind his co-partners to arbitration unless they have wholly abandoned the business to him or are incapable of acting. (Sec. 2430, C. C. P.) The case of Jones vs. Bailey, 5 Cal. 345, has a good decision on this point.

Corporations or firms must execute a submission in the same formal manner as they would any deed or similar instrument under the corporate seal, and by the signatures of the duly authorized officers of the company.

Amendments, if necessary, to submissions must be made prior to the first hearing. Grounds for revocation of a submis-

sion are, the death of one of the parties, undoubted bias or misconduct on the part of an arbitrator, or his refusal to proceed.

Should it be desired to revoke a submission, then such intention by the parties should be embodied in an instrument executed in the same manner as the original submission. There are, however, decisions supporting the doctrine that, a submission once made a rule of the court, is irrevocable without leave of the Court. (Cal. Academy of Sciences vs. Fletcher, 99 Cal., 207; 33 Pac., 857.) An agreement between the parties in the submission, not to revoke, does not finally destroy revocability. If the submission be not made an order of the court, it may be revoked at any time before the award is made. The disadvantage of that method is obvious.

The submission should set a date upon which the award is to be made and published, and such date is, of course, subject to any reasonable extension of time actually necessary. If no time is set, then sixty days might not be considered an unreasonable time, depending largely, however, upon conditions in each particular case. It is better to fix a date in place of saying so many months hereafter. (There is a doubt whether lunar or calendar months are intended.)

It is advisable that the submission, and acceptance by arbitrators and umpire, be executed in duplicate, one of each to be filed, as already stated, and the duplicate copy to be retained by the arbitrators for their guidance.

Every care should be taken to state exactly what it is that is to be arbitrated. The author has found it a good plan to have detailed schedules of each specific item or claim which each party makes against the other, and vice versa, set forth in the submission, so as to leave no possible room for argument later on during the conduct of the arbitration proceedings. This prevents the importation of foreign or other matters by the parties during the hearing, a practice which, if permitted, disorganizes the procedure, and causes, therefore, discussion and loss of time, also, consequently, expense to the disputants. Apart from this, an arbitrator cannot arbitrate upon

any matter in difference that is not contained in the submission; therefore every claim, pro and con, should be set forth in the submission.

When a building contract provides that payment for extra work be submitted to arbitration, the contractor should make formal demand for arbitration before commencing suit. (Scammon vs. Denio, 72 Cal., 393; 14 Pac., 98.)

It must be remembered by the layman that a submission to arbitration cannot, nor does it, oust the jurisdiction of the court, nor is it intended that it should; and a submission will very properly be void if its provisions are drawn with that object in view. An interesting case on this is Loup vs. Cal. South. R. Co., 63 Cal., 97.

It might be well to add a few words regarding Insurance Arbitration. An independent agreement under a policy of insurance submitting the amount of loss to appraisement, is considered as a common-law arbitration. (Georgia Home Insurance Co. vs. Kline, 114 Ala., 366; 21 So., 958.)

It may be of interest to note also that in reciting Supreme Court decisions, "May on Insurance," page 1176, says: "Any stipulation, therefore, which merely looks to the requirement of certain acts to be done or omitted before bringing an action, seems to be valid, since such a stipulation not only does not oust the courts, but obviously contemplates and makes preparation for an appeal to the courts. It is manifest that the arbitration thus provided for is intended to afford a simple and speedy remedy for the settlement of disputes in regard to losses, and to simplify proceedings in case of a resort to the courts, and is not necessarily to be governed in all respects by the rules which apply to a trial in court. An award so arrived at is not to be lightly set aside, even though there may have been informalities or irregularities in the conduct of the proceedings, if it appears, or the Court may have found, that the arbitrators making the award acted in all matters pertaining to the submission in good faith, and with an honest desire to come to a correct result. In such a case the award, it seems to us, should stand."

From still another interesting decision (George A. Case vs. Manufacturers Insurance Co., 82 Cal., 263) it appears that where an arbitration clause in an insurance policy does not fix the number of arbitrators, nor state how they are to be selected, then there can be no right to arbitration.

It would seem, however, in speaking of insurance matters, that a "valuation" is not arbitration, in the correct sense of the term, but rather an appraisement which prevents differences, and does not really settle any which may have arisen.

CHAPTER SIX

Mode of Procedure

Having qualified, the two arbitrators will arrange an early meeting between themselves to discuss the mode of procedure, to carefully ascertain their powers and duties under the terms of the Submission. At this meeting may be presented a list of witnesses which the parties may at that time desire to call. The arbitrators should go carefully through each claim made by the respective parties, for the purpose of clearly informing themselves as to the matters in dispute. It is also incumbent upon the arbitrators to carry out their duties with all possible diligence.

Should it be apparent, as is frequently the case, that a disagreement is pending, and if it does actually occur between the two arbitrators, the umpire should be immediately notified that his services will be required, and he must qualify in the same manner as the two arbitrators have previously done.

The author considers that it is better to nominate an umpire at the same time or before the original arbitrators qualify, even though his services are never required. Cases have been known where, after disagreement has occurred, arbitrators could not agree upon an umpire.

Where two arbitrators can agree, and adjust all matters in dispute without the umpire being called in, matters are, of

course, simplified. When the arbitrators are ready to proceed they should serve a notice of hearing upon the parties (see Form F), and subpoena witnesses designated by both parties. Where the selection of an umpire is conditional upon disagreement of arbitrators, the disagreement need not be a serious one, but they should not "agree to disagree," as is sometimes done; they must act in good faith in all things. It will be a sufficient disagreement if one arbitrator requires more evidence than the other. Notwithstanding such disagreement, the two original arbitrators must continue to act, hear testimony, and otherwise perform their duties, a majority of the three, if not all three, joining in the award. If all three can afterwards agree and sign the award, although not absolutely necessary, it forms a fitting conclusion to an arbitration.

Arbitrators as such are (although they may even be attorneys by training) not expected, nor are they compelled, to follow court methods or even be familiar with them. They may determine their own course of procedure. They have to decide solely upon the facts, after hearing all the testimony, and bringing their own technical knowledge to their aid in arriving at a decision. They should take notes of the proceedings, even though the case may be one of short duration or of minor importance. In more important cases it is prudent to arrange for stenographic reports to be taken and duly verified.

Arbitrators must, of course, hear all the evidence on both sides. Lord Eldon, the eminent jurist, once said: "By the great principles of eternal justice, which is before all acts, regulations, and proceedings of court, it is impossible that an award can stand where arbitrators hear one side and decline to hear the other."

The case of Curtiss vs. City of Sacramento, 62 Cal., 102, presents an interesting decision on this point. It is an application to set aside an award on the ground that no opportunity was given the parties to submit evidence. Briefly, the point arose in this way: Two arbitrators met without the third one and took testimony; the third arbitrator then arrived at his decision by reading over the notes of the evidence without being

present when it was given. The court held that the award was invalid and void.

Unless there is proof to the contrary, the court will presume in favor of the integrity of the arbitrators and the regularity of their acts. Neither party should be allowed to speculate upon the probability of his getting a favorable award, and therefore if any objections are to be taken in the course of procedure or otherwise, they should be made at the time the cause for such objections first occurs; if not, a waiver regarding them may be reasonably assumed by the arbitrators. If one of the parties should substitute a foreman or other representative in place of himself at a hearing, it would operate as a waiver of objections on his part to the acts of the arbitrators, as illustrated in the case of Foster vs. Carr, 135 Cal., 83; 67 Pac., 43.

Should either side wish to be represented by counsel before the Board of Arbitration, the arbitrators should be notified in good time, as well as the parties of the other side; and although arbitrators are not bound to hear counsel, it scarcely seems fair, to the author, that there should be a refusal to do so within proper limits, subject to the discretion of the arbitrators. In such cases stenographic reports of proceedings should always be taken, and preserved until all questions of dispute between the parties are finally disposed of.

In regard to evidence, all witnesses must be sworn, or make affirmation if their religious or similar belief is urged as an excuse for not taking the usual oath. A convenient proceeding in opening an arbitration is as follows: The party to begin, the one who demanded arbitration (equivalent to plaintiff in a court action), makes a short statement of his case, which may be read or given viva voce. He may then proceed to call his witnesses to support his statement. The other party may then make a similar statement, and produce his witnesses, and he may reply upon the entire claims. The party commencing is then at liberty to make general reply. All witnesses may of course be cross-examined by the arbitrators, and with their permission either party may ask questions of the other party or his witnesses, in so far as it may in the arbitrators' opinion

be necessary to bring out the truth or material facts. An arbitrator is bound by the same rules as a judge. Affidavits should not be received in lieu of viva voce testimony. If documentary evidence is submitted, insist upon seeing originals. Entries in time sheets or material books kept for the benefit of one party are regarded as insufficient evidence, but they may be used against him by the other party if the latter so desires. Such evidence has about the same value as hearsay evidence, and should be accepted with reserve, for nothing can prevent persons from making entries to suit themselves, and submitting same to confirm their subsequent statements. Bookkeepers or others who wrote the entries in books should be called to prove them. A witness, however, should be permitted to refer to any original notes made by himself, or to authenticated copies, for the purpose of confirming or reinforcing his memory. Drawings, specifications, correspondence, documents, etc., should always be identified by testimony, and conveniently lettered for future identification as Exhibit "A," "B," "C" and so on before being admitted as evidence.

It is clearly the duty of both parties to use every care and diligence in obtaining and presenting evidence in support of their claims, and in disproving incorrect claims of the other parties. Such testimony should be brought in at a proper stage of the proceedings. (Montifiore vs. Engels, 3 Cal., 431.) If one of the parties rests, or omits to submit any testimony for an unreasonable length of time, then the arbitrators may be justified in not again hearing such party.

The rules of evidence apply in Arbitrations the same as before a court. False testimony, under oath, is always abhorrent and punishable by the statute.

If it should appear to arbitrators, by reason of any new development or otherwise, that a fairer decision may be arrived at, they have ample power to re-open and re-consider any matter, and they have the right to refuse to do so when once their decision has been made.

Either party is entitled to apply to have an arbitration stopped if it can be shown that arbitrators are receiving testi-

mony at a time at which said party had not been notified that testimony would be taken. Parties may also, if they desire, abandon or repudiate a valid award by mutual consent by means of a subsequent agreement to re-submit their differences to the arbitration of the same or different arbitrators.

Now we will consider the position of umpire. Provision is made in many building contracts that if the two arbitrators cannot agree they shall select a third, or umpire, to act with them. It has been held in Dudley vs. Thomas, 23 Cal., 365, that arbitrators duly qualified may appoint the umpire at any time after such qualification and prior to the making of an award, and it would therefore appear that it is quite unnecessary to defer the appointment of the umpire until disagreement between arbitrators has occurred, although this very provision may be so stipulated in the contract agreement. At any rate, in practice it is found to be a bad and very inconvenient condition in building arbitrations, and it would seem to be better, and quite proper, for the umpire to be selected immediately after the arbitrators and before the investigation is commenced. A convenient arrangement is for the umpire to sit with the arbitrators and act as chairman of the board. By so doing he has the advantage of not only hearing, but of directing the presentation of, testimony from the commencement of the proceedings; and he is thus prepared, if disputes do occur, to render his decisions without putting witnesses on the stand twice over, which would be necessary if the two original arbitrators were unable to agree, and which is so frequently the case in building disputes. The umpire should, however, refrain from voluntarily joining in any discussion between the arbitrators in their efforts to agree, his duty being to decide when appealed to by them for the reason that they cannot agree; in short, his authority to act does not come until the arbitrators cannot agree. He must himself hear all the testimony in relation to any matters passed up to him for a decision. As has been shown, it is not sufficient to use the notes of testimony made by others, and it should be remembered that the umpire does not decide as between the arbitrators, but solely between the parties to the submission.

In the case of a building arbitration to determine differ-

ences between partners, it would be inadvisable for laymen arbitrators to proceed without first taking counsel's advice as to partnership rights of the parties.

When the testimony is all in, each party should be notified that the hearing is about to be closed, and the question should be asked whether they have any further evidence to present, and that the arbitrators will proceed to consider their award; but, having duly notified the parties from time to time as to the place and hour of hearing, and adjournments thereof, and all the evidence being in and heard by each of the arbitrators, it is not obligatory that they should notify the parties of the place or hour at which they will convene finally to consider and determine the issues that may remain undecided; for, like court jurors, they may consider and make their award in private, and it may be stated that the courts make no distinctions between the awards of lay and legal arbitrators.

Finally, it should be remembered that it is most undesirable, and certainly not conducive to the final adjustment, for arbitrators to proceed in any other than a strictly formal disinterested manner, and accepting no favors from either party or their witnesses. Nothing they may do will hold good unless all have acted together. One must not absent himself from a hearing and then accept what another may say occurred. All must act together.

CHAPTER SEVEN

The Award

In submissions, one may frequently find a clause to the effect that the parties agree not to appeal from the award; but, as has already been stated, an arbitration cannot oust the jurisdiction of the court, and such a clause could in no sense prevent it from exercising that jurisdiction if occasion demands.

My knowledge of the statutes is insufficient to warrant my saying that a Legislature intended an arbitrator's award to be

absolutely final and beyond appeal except for fraud or misconduct, but it would appear that such was the original intention, and an amendment making it so might prove to be a wise provision for disputants.

An award must conform to the requirements of the submission and be made in good faith, based upon justice; and, provided always that the arbitrators' acts have at all times been lawful, an award will stand and may be enforced by the court in the same manner as a judgment. If the award, which should be in writing, is an equitable decision, founded upon reason, and even though the actual law in the premises is entirely disregarded, the award would not in consequence be rendered invalid or void. The statutory requirements, however, must be observed if judgment is to be entered upon the award, or the latter may be successfully attacked.

The award, of course, must not be prepared until all the testimony is in and the enquiry is closed. It should state that all the evidence has been heard and that all the disputed matters have been determined and closed, otherwise the award is liable to be held defective and set aside. When the submission has been made an order of the court, then the award, which must in such cases be in writing, may be filed with the clerk of the county, who will make a note of it in his register, and upon the expiration of the required time (usually five days) thereafter, and upon application by one of the parties, who will make affidavit that a notice of the filing of the award has been served upon the other party four days prior to such application being made, and that no order staying entry of judgment was outstanding, then the award shall be entered by the clerk as a judgment, having the full force and effect of a court judgment. (Sec. 1286 Cal., C. C. P.) There can be no appeal from a judgment entered before a motion is made. The court, upon motion by one of the parties, may modify or correct an award under certain circumstances—for example, in the case of obviously incorrect calculation of figures, or a faulty description of a person, or of real estate, or where an award included matters which are not a part of the matters submitted to arbitration, and so forth (See Sec. 1288, Cal. C. C. P.), but the greatest care

is necessary in writing out the award, for it cannot be legally altered by the arbitrators, even to correct errors. A verbal award, in other respects good, would not be invalid, but among its disadvantages judgment cannot follow its publication, nor indeed can this be the case upon written awards unless the submission in such particular matter has been previously entered as an order of the court.

It is usual to recite from the submission the authority for the investigation and other points essential to clearness. The exact terms of the submission must be closely followed and its specific language complied with. The award must deal only with the specific matters of controversy, nothing more nor less. The award should preferably be written by the arbitrators, or one of them, and not by any other person—for example, by the attorney of either of the parties. If some special form or arrangement of the award is necessary by reason of some unusual complications or controversies, then, even in such a case, the actual award must be the arbitrators' own decision, and not that of any other person; and it would be well that an outside attorney, entirely disinterested, should be asked to advise as to any particular form that may be desired or necessary.

Where the submission stipulates for the ascertainment of a definite amount to be payable by one or both parties to the other, the award must definitely fix the amount or amounts so to be paid by one or both parties to the other, and it should be stated how and when such amounts are to be paid; but if the award leaves such matters unsettled, or fails to give data from which such amounts may be readily computed, then such award is bad. It is sufficiently definite, however, if it requires only a simple mathematical operation to fix such amount or amounts.

An honest mistake of judgment on the part of arbitrators which does not go beyond the limits of the submission is not, as a rule, regarded as cause for impeachment, notwithstanding that the court might have decided otherwise. The court will not substitute its judgment for that of the arbitrators, provided always that the latter was made all in good faith. The award must be definite, final, unmistakable and conclusive in its

language and parts. The expression occasionally used, "we propose" that such a thing be done, is too ambiguous and should not be used. We "direct" is proper and much to be preferred.

Every right and obligation of each party must be clearly fixed and made definite. The award should be made within the time stipulated in the submission, or within such period of extended time as may have received the sanction of the court and the parties, or if there be no time stipulation, then sixty days would not be considered an unreasonable limit. An agreement between the parties authorizing an extension of time for delivery of the award should be by deed corresponding with the original submission.

Arbitrators are not required to give details of their figures, nor reasons nor explanations as to how or why they arrived at their conclusions, any more than judges of the court are required to do such things. (See Arbitration between Connor and Pratt, 128 Cal., 279; 60 Pac., 862.) Even comments and discussions concerning an award with the parties or other persons are best avoided, and during the course of an arbitration it is far better that no conversation on the subject shall be held with any person, unless it be with a co-arbitrator. An arbitrator should on no account publicly anticipate an award, or express hostile or favorable opinions concerning the parties or their methods. Such conversations, if they become known, may later on be construed to amount to bias or prejudice, and afford ample grounds for vacating an award (Tyson vs. Wells, 2 Cal., 122), even though the co-arbitrator had preserved a proper disinterested attitude. It seems almost needless to add that no arbitrator should be a party to the purchase or the acceptance of a lien upon the undetermined interest of either party in an arbitration, whether contingent upon the award or otherwise.

The award must not only state the amount of money due from one party to the other, but it should direct its payment and when it is to be paid, otherwise a non-payment would not constitute disobedience of the award.

A judgment entered upon an award may be appealed (Fairchild vs. Boten, 42 Cal., 125), notwithstanding any counter

stipulation in the submission. A writ of execution will follow judgment upon an award the same as upon any other court judgment.

An award may be set aside if serious irregularities on the part of arbitrators or umpire can be shown—for example, corruption, fraud, gross error or material misconduct, irregularity, refusing to postpone a hearing, or if the arbitrators have acted in any way in which the rights of the parties have suffered or been prejudiced, or if any award has been improperly procured. But, as already implied, an award cannot be impeached solely as being contrary to law and evidence (Carsley vs. Lindsay, 14 Cal., 394), and this is a good point to remember.

The author recalls a case in which one of three arbitrators declined to sign an award, upon the ground that it was contrary to the evidence, and this arbitrator filed a minority report to that effect, but it would appear that such a proceeding could have been of little or no value in any attempt to impeach the award. As such report has no effect, it is quite unnecessary and might well be omitted entirely. Wherever possible it is better for all the arbitrators to sign the award in the interests of finality.

Wherever the statute requires arbitrators to acknowledge the execution of awards, this must be done to entitle either party to a judgment upon an award, and in any case it is desirable that the award should be signed by the arbitrators at the same time and place—i. e., in the presence of each other. It is obvious, of course, that one award only can be made.

Courts usually construe an award with a desire to sustain the judgment of the arbitrators whom the parties have themselves selected to be their judges, and in favor of finality and validity; but an offensive award, or one in direct opposition to the rights of the parties, cannot stand.

An award may be set aside where one party was induced to agree to arbitration through misrepresentations made by the other party, or if in submitting testimony material facts have been suppressed which might have affected the decision. It has also been held that false testimony will, in certain cases,

justify the setting aside of an award, or of the latter be uncertain or incomplete. The award must be decisive and all matters disposed of. (Jacob vs. Ketcham, 37 Cal., 197; Porter vs. Scott, 7 Cal., 312; White vs. Arthur, 59 Cal., 33.)

The case of Peachy vs. Ritchie, 4 Cal., 205, is interesting as showing grounds for impeachment. (See also Code of Civil Procedure in the several states.)

The reason for the foregoing seeming strictness exhibited by the courts in reference to arbitrations is because arbitration is a purely statutory proceeding, and there can be no doubt whatever that the statute must be closely followed. It has been decided, however, in Kreiss vs. Hotaling, 96 Cal., 617; 31 Pac., 740) that a substantial compliance with the statute is sufficient.

It is not advisable to date or publish an award upon a legal holiday, or upon a Sunday.

CHAPTER EIGHT

Compensation of Arbitrators and Umpire

There is a doubt at common law—assuming there is no definite promise to pay—whether an arbitrator can legally recover his compensation by an action at law. Lord Kenyon, the eminent jurist, ruled in 1801 that the office of arbitrator was purely an honorary one, and the author believes that decision is still maintained. Now, however, business conditions have entirely changed, and common sense would indicate that there is an implied promise to pay the costs of arbitration by the parties to a submission, the more so in recent years, when, among architects, contractors, and engineers, are found competent persons who regularly undertake arbitration matters and the adjustment of building disputes as a part of their regular profession or occupation. It would be absurd to say that when such persons are invited to adjust disputes between contending

parties it is expected they will act in an honorary capacity.

The compensation of an arbitrator or umpire depends somewhat upon the circumstances attending each separate case, the importance and nature of the matters in dispute, location, and to some extent the time employed, and the amount of money involved in the dispute. All such things should be considered. A fee per diem is usually arranged. Parties to arbitrations should understand that the time an arbitrator is engaged in hearing testimony is not only the time that should be paid for, for the reason that a careful arbitrator, like a careful judge, scarcely ever ceases to weigh and consider the matters submitted to him until the award is actually made. This constant responsibility must accordingly establish the basis of his compensation, and so it is customary to charge one day for each sitting. Nor does it follow that an arbitrator's or umpire's compensation is alike in all cases; it is more businesslike for each to fix his own individual compensation, which they have the right to do, except where it is fixed by statute. It may, however, be left to the discretion of the court. In building arbitrations the fees can usually be determined beforehand, and this is the better plan. The compensation must on no account be contingent upon the result of the arbitration. It seems superfluous to say this, but the author has met with such cases.

In the absence of a definite agreement as to who shall pay the costs and expenses of an arbitration, both parties might be held liable for the full amount. (Young vs. Starkey, 1 Cal., 426.) An arbitrator's claim for compensation if there be a promise to pay, implied or otherwise, may be enforced in the courts of law the same as any other legal or just claim.

The award should clearly direct how, when, and by whom the costs, etc., should be paid. It is more satisfactory that these should be paid in the first place by the party who takes up the award, and the expense adjusted afterward between the parties as the award may direct. If the compensation has not been fixed beforehand, then a reasonable compensation is naturally implied, but in such a case arbitrators might find it difficult to collect by legal process, if the claim was contested. Where such agree-

ment or promise does exist, then the arbitrators have a lien upon the submission and award until their charges are paid, and it is advisable that the contents of the award should not be made known until this has been done.

Note.—In the preparation of the foregoing pages the author is indebted for references to the following standard works: Code of Civil Procedure, Cyclopedia of Law and Procedure, Redmond's Law of Arbitration and Awards; Bancroft-Whitney's Cal. Digest, Journal of the Western Society of Engineers, Parsons' Law of Business.

(See also **"Arbitration—Its Place in Our Professional Practice,"** a paper read by the author before the Technical Society of the Pacific Coast November 2, 1900, and printed in the *Journal of the Association of Engineering Societies;* also see *The American Architect,* April 13, 1901.

CHAPTER NINE

Convenient Forms

FORM A (Wright). *Demanding Arbitration.*

BUILDING ARBITRATION—NOTICE.

To .....191.....

.....

A disagreement having arisen in connection with the performance and completion of a certain Building Contract made and entered into between you and myself, dated.....191....., I hereby give you notice that under the provisions of said contract I hereby demand an Arbitration for the purpose of finally adjusting and settling all matters in difference between us, as provided for in said contract.

I hereby nominate Mr. ..... as one Arbitrator, and request you to nominate another Arbitrator on or before.....day of.....191....., and notify me thereof.

.....

Address.....

FORM B (Wright). *Accepting Arbitration.*

BUILDING ARBITRATION—REPLY TO NOTICE.

To .....191.....

.....

In accordance with your notice to me dated.....191....., demanding Arbitration, I hereby comply therewith and nominate Mr. .....as an Arbitrator, and have requested him to communicate with Mr. ....., whom you have nominated as an Arbitrator.

.....

Address.....

FORM C (Wright). *Submission.*

BUILDING ARBITRATION—SUBMISSION.

THIS INDENTURE, made by and between.....
of the City of....., County of.....,
State of....., ...of the first part,
hereafter called the Owner, and.....,
of the City of....., County of.....,
State of....., of the second part, hereafter called the Contractor.

WHEREAS, the parties hereto have heretofore entered into a certain Building Contract, dated.....191....., and which contract was filed with the Recorder of the City of.....,
County of....., on the.....day of
.....191....., and

WHEREAS, said contract did contain the following stipulations, to wit:

(insert Arbitration Clause in full).

NOW, WHEREAS, a dispute, and disputes, has and have arisen, and are still undecided and existing, between said parties, as hereafter set forth, to wit:

Said owner claims against said contractor the amounts set forth in the following Schedule marked "A," as follows, to wit:

SCHEDULE A.

(Here state in detail all the owner's claims against said contractor and estimated money value thereof.)

which is disputed by said contractor. Said Contractor claims against said Owner the amounts set forth in the following Schedule, marked "B":

SCHEDULE B.

(Here state in detail all the contractor's claims against said owner and estimated money value thereof.)

which is disputed by said owner.

NOW, WITNESSETH: That the parties to said contract and to this Sub-

mission to Arbitration do each of them and for their respective heirs, administrators and assigns, covenant and agree with each other to and do hereby submit all the before mentioned disputes as herein set forth to the award and final determination of.....and..... as Arbitrators, and to such Umpire as these two last named persons may select, in accordance with the before-recited stipulation in said Contract, and further that this Arbitration shall be conducted in all respects according to the provisions of Sections.....of the Code of Civil Procedure of the State of.....and that this Submission be entered as an order of the Superior Court in and for the County of....., State of.....

The Arbitrators are hereby directed to state in their Award to what amount in lawful money the said Owner is indebted to said Contractor, if any, and to what amount in lawful money the said Contractor is indebted to said Owner, if any, and how and when such indebtedness, if any, shall be paid by both or either one to the other, in final settlement of all matters in difference under this Arbitration.

And the parties hereto do hereby further mutually agree as follows, to wit:

The award shall be made and published not later than the..... day of.....191....., subject to such reasonable extension of time as may be necessary. The award shall thereupon be entered as a judgment of the Superior Court of.....

The costs and expenses of this Arbitration shall be borne and paid by us, the parties hereto, in such proportion as the award shall direct; and if so directed by the award, the party taking up the award shall pay to the Arbitrators the full amount of the costs and expenses thereof before the award is delivered, and the other party shall then within twenty-four hours pay to or refund to the one paying the full amount the proportion of the costs and expenses which the award directs him to pay. The total amount of said costs and expenses and the amounts due from each party shall be stated in the Award.

FINALLY: The parties hereto mutually agree to stand to and abide by the award and to forthwith comply with and execute all orders, awards, decisions, and judgments therein contained.*

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this.....day of....., 191.....

.....

.....

Subscribed and sworn to before me this.....
day of....., 191.....

(NOTE: In cases where it may be more convenient, Forms D and E may follow Form C and form part of the same document.)

* Optional, "and they further agree not to appeal from such final award."

FORM D (Wright). *Arbitrators' Acceptance.*

BUILDING ARBITRATION.

We, the undersigned, ...and ....., having been nominated to act as Arbitrators for the purpose of finally adjusting and settling all disputes and matters in difference existing between..... and.....arising out of the performance and completion of a certain Building Contract made and entered into between the parties last named, dated the.....day of....., 191....., do hereby, each for himself, accept such nomination, and we each will faithfully, fully and fairly hear the allegations of the parties and the testimony presented to us, and we will each for himself make a just and true award according to our best understanding, and we hereby select and appoint .....as Umpire, in accordance with the provisions of the before-mentioned Building Contract.

.....Arbitrator.

.....Arbitrator.

Subscribed and sworn to before me this.....

day of....., 191.....

FORM E (Wright). *Acceptance by Umpire.*

BUILDING ARBITRATION.

Whereas, ...and....., Arbitrators duly qualified, having selected and appointed me, the undersigned, as Umpire for the purpose of finally adjusting and settling all matters in difference existing between.....and .....arising out of the performance and completion of a certain Building Contract, made and entered into between the parties last named, dated the.....day of....., 191....., I do hereby accept such selection and appointment.

Further, I will faithfully, fully, and fairly hear such allegations of the parties and testimony as may be presented to me, and I will make a just and true award according to my best understanding.

.....Umpire.

Subscribed and sworn to before me this.....

day of....., 191.....

FORM F (Wright). *Notice of Hearing.*

BUILDING ARBITRATION.

To..... } Parties to Submission to Building Arbi-
and } tration, dated.....day of
..... } ....., 191.....

NOTICE OF HEARING.

In the matter of the above Arbitration we appoint the.....
day of....., 191....., at the hour of.....,
at.....as the time and place for hearing the allegations and testimony therein.

The time and place at which adjourned meetings will (if necessary) be held will be announced at the above and adjourned meetings. You will please take notice thereof and attend.

.....Arbitrator.

.....Arbitrator.

.....day of....., 191.....

FORM G (Wright). *Subpoena for Witnesses.*

BUILDING ARBITRATION.

SUBPOENA.

..... } Parties to Submission to Building Arbi-
and } tration, dated.....day of
..... } ....., 191.....

To.....

.....

In the matter of the above Arbitration you are hereby notified to attend before the Arbitrators, without fail, for the purpose of giving testimony in the said matter at.....on.....,
the.....day of....., 191.....

.....Arbitrator.

.....Arbitrator.

.....day of....., 191.....

FORM H (Wright). *Oath.*

BUILDING ARBITRATION.

An Arbitrator will first say to each witness as follows, viz: This is an Arbitration to adjust and settle certain matters in difference existing between

.....and..... as set forth in a certain Submission to Arbitration dated.....

One of the Arbitrators will administer the oath as follows:

The testimony you shall give touching all matters concerning this Arbitration shall be the truth, the whole truth, and nothing but the truth, so help you God.

(The witness will stand, uncovered, with right hand raised, during the administration of the oath.)

AFFIRMATION: to be similarly used for witnesses having no religious belief, as follows:

I sincerely, solemnly, and truly affirm and declare that I will answer truly all questions put to me concerning this Arbitration.

NOTE: Where an interpreter is necessary it is customary to first swear the interpreter. The witness then takes such oath as he states shall be binding upon him, administered by an Arbitrator, through the interpreter.

BUILDING ARBITRATION.

....., 191.....

Parties to Arbitration { .... }

Arbitrators { .... }

AWARD.

To..... and .....
and whom else it may concern:

WHEREAS, by a certain Submission to Arbitration dated the.....
day of....., 191....., made between.....
.....and.....for the purpose of submitting all disputes then existing between them, as set forth in Schedules "A" and "B," forming part of said Submission to.....
and....., Arbitrators duly qualified, for their final determination and award, and who, in case they could not agree, were empowered to select an Umpire in accordance with the terms of a certain Building Contract entered into by the first named parties herein; and

WHEREAS, the two said Arbitrators have disagreed and have selected .....as an Arbitrator to act as Umpire; and

WHEREAS, the decision of any two of the last-named Arbitrators and Umpire shall be binding upon the parties to this Arbitration, as provided for in the before-mentioned Contract; and

WHEREAS, We, the undersigned, acting together, having heard all of the testimony of each of the said parties and the arguments presented to us, and having examined all witnesses under oath, and the evidence on both sides being now all in, and all disputed matters determined and closed, we hereby make and publish our award herein as follows, to wit:

AWARD.

WE DIRECT.....Owner, to pay unto.....Contractor, the sum of .....Dollars, ($.....), in United States lawful money within seven days hereafter.

WE DIRECT....., Contractor, to pay unto....., Owner, the sum of .....Dollars, ($.....), in United States lawful money within seven days hereafter.

We also direct that the above payment, and payments, shall be made and accepted by the parties in final settlement of all disputes and matters in difference between them under this Arbitration.

And we further direct that the total costs and expenses of this Arbitration, amounting to the sum of.....Dollars, ($.....), shall be paid to the undersigned by the party taking up this award, and that..... ,owner, shall pay the sum of.....Dollars, ($.....), as his proportion of said costs and expenses, and that ..... Contractor, shall pay the sum of .....Dollars, ($.....), as his proportion of said costs and expenses.

IN WITNESS WHEREOF, we have together and in the presence of each other attached our signatures to this our Award, the.....day of ......, 191.....

.....Arbitrator.

.....Arbitrator.

.....Umpire.

Subscribed and sworn to before me this.....

day of....., 191.....

NOTE—The Author will be pleased to receive any suggestions from readers with a view to making future additions of this work of more value or interest to laymen. Any reports of recent interesting Arbitration cases appertaining to Building Construction will be much appreciated if forwarded.

571 California Street
San Francisco, Cal.

G. ALEXANDER WRIGHT.

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